Laborers' International Union of North America, Local 310 *and* KMU Trucking & Excavating, Schirmer Construction Co., Platform Cement, Inc., 21st Century Concrete Construction, Inc., Independence Excavating, Inc., Donley's Inc. *and* International Union of Operating Engineers, Local 18, AFL–CIO. Cases 08–CD–109665, 08–CD–109666, 08–CD–109671, 08–CD–109683, 08–CD–109709 and 08–CD–114937

September 3, 2014

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

This is a consolidated jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of charges in Case 08–CD–109665 on July 23, 2013[1] by KMU Trucking & Excavating (KMU). Additional charges were filed on July 23 in Case 08–CD–109666 by Schirmer Construction Co. (Schirmer); on July 23 in Case 08–CD–109671 by Platform Cement, Inc. (Platform); on July 23 in Case 08–CD–109683 by 21st Century Concrete Construction, Inc. (21st Century); on July 23 in Case 08–CD–109709 by Independence Excavating, Inc. (Independence); and on October 18 in Case 08–CD–114937 by Donley's Inc. (Donley's).[2] The Employers[3] allege that Laborers' International Union of North America, Local 310 (Laborers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employers to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). An order consolidating cases and notice of hearing issued September 30, 2013, a second order consolidating cases and notice of hearing issued December 13, 2013, and a hearing was held on January 13 and January 14, 2014, before Hearing Officer Melanie R. Bordelois.[4] Thereafter, the Employers, Operating Engineers, and Laborers filed posthearing briefs.[5] Operating Engineers also filed a motion to quash the 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.

I. JURISDICTION

The parties stipulated that in the 12-month period prior to the hearing, Employers KMU, Schirmer, Platform, 21st Century, Independence, and Donley's each purchased and received materials valued in excess of $50,000 directly from points located outside the State of Ohio. The parties further stipulated, and we find, that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employers, all of whom operate in northeastern Ohio, are involved in various aspects of construction work ranging from site development and demolition to general contracting and concrete work, and have employed employees represented by both Operating Engineers and Laborers for many years. They have also all been signatories to a series of successive collective-bargaining agreements, negotiated by the Construction Employer's Association of Greater Cleveland (CEA) with both Unions.[6] The respective contracts cover construction work performed in Cuyahoga County in northeastern Ohio, where the jobsites at issue in this case are located. The most recent of these contracts are effective from 2012 through 2015.[7]

The Employers utilize various kinds of equipment in their construction projects, including forklifts and skid steers, a type of small front-end loader. Representatives of the Employers testified that they have a long-held

[1] All dates are in 2013 unless otherwise indicated.

[2] We note that the hearing officer inadvertently stated in her report that these dates were in 2012.

[3] KMU, Schirmer, Platform, 21st Century, Independence, and Donley's will be referred to as "the Employers."

[4] In two recent related cases, *Laborer's Local 894 (Donley's, Inc.) (Donley's I)*, 360 NLRB No. 20 (2014), and *Operating Engineers Local 18 (Donley's, Inc.) (Donley's II)*, 360 NLRB No. 113 (2014), the Board found reasonable cause to believe that Sec. 8(b)(4)(D) had been violated with respect to two disputes involving Operating Engineers Local 18 and Laborers. *Donley's I* involved Laborers Locals 310 and 894; *Donley's II* involved Laborers Local 310. Laborers and the Employers moved that the records in those cases be incorporated into the instant proceeding, and the hearing officer granted the motion.

[5] Laborers filed a brief stating that it incorporates the Employers' posthearing brief and adopted the Employers' arguments as its own.

[6] CEA is a multiemployer bargaining association that represents construction industry employers in negotiating and administering collective-bargaining agreements with various labor organizations.

[7] The CEA-Operating Engineers contract states that it is effective May 1, 2012 through April 30, 2015. Although it does not include exact dates, the CEA-Laborers was entered into on May 1, 2012 and states that it is effective from 2012 through 2015.

practice of assigning the operation of forklift and skid steer equipment to employees represented by Laborers. Specifically, witnesses for five of the Employers testified that, in the time they have worked for their respective employers, the forklift and skid steer work was always assigned to employees represented by Laborers. In addition, Rob DiGeronimo, vice president of Independence, testified that Independence has assigned its forklift and skid steer work to employees represented by Laborers except that, on the "rare" occasion when it had "full-time, continuous work," it would assign the work to employees represented by Operating Engineers.

After the ratification of successor 2012–2015 contracts between CEA and Laborers and CEA and Operating Engineers, the Employers began work on various construction projects in Cuyahoga County. On each of these projects, the forklifts and/or skid steers were operated by employees represented by Laborers. Upon learning of the assignment of this work to employees represented by Laborers, Operating Engineers filed "pay-in-lieu" grievances against each Employer, seeking the payment of wages and fringe benefits for each day that employees other than those represented by Operating Engineers operated the forklift and/or skid steer equipment on the construction projects.

Following the filing of each pay-in-lieu grievance, the recipient Employer sent a letter to Laborers' business manager, Terence Joyce, stating that if it were to lose the grievance it would need to reassign the forklift and skid steer work to employees represented by Operating Engineers. Joyce sent each Employer a letter in response, stating that if the forklift and skid steer work were reassigned to Operating Engineers-represented employees, Laborers would "picket and strike any and all projects where such assignments took place."

B. Work in Dispute

The work in dispute in Case 08–CD–109665 (KMU) involves the operation of forklifts and skid steers as part of a construction project at Equity Trust in Westlake, Ohio. The work in dispute in Case 08–CD–109666 (Schirmer) involves the operation of skid steers as part of a construction project at South Pointe Hospital in Warrensville Heights, Ohio. The work in dispute in Case 08–CD–109671 (Platform) involves the operation of skid steers as part of a construction project at Equity Trust in Westlake, Ohio. The work in dispute in Case 08–CD–109683 (21st Century) involves the operation of forklifts as part of a construction project at Southwest General Hospital in Middleburg Heights, Ohio. The work in dispute in Case 08–CD–109709 (Independence) involves the operation of forklifts and skid steers as part of a construction project at Alcoa in Cleveland, Ohio. Lastly, the work in dispute in Case 08–CD–114937 (Donley's) involves the operation of forklifts and skid steers as part of a construction project at University Hospitals' Lot 59 Garage in Cleveland, Ohio and the operation of forklifts as part of a construction project at Commerce Park in Beechwood, Ohio.

C. Contentions of the Parties

The Employers and Laborers contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated by the threats to picket and strike over the assignment of forklift and skid steer work at the construction projects referenced above,[8] and that the work in dispute should be awarded to employees represented by Laborers based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. Finally, they contend that a broad area wide award is warranted, coinciding with the territorial jurisdiction of Operating Engineers Local 18, because it is likely that disputes over the assignment of forklift and skid steer work will arise on future projects.

Operating Engineers contends that the notice of hearing should be quashed because it has not claimed the work in dispute. Operating Engineers contends that it is merely seeking economic damages for breaches of the CEA-Operating Engineers contract, and thus the disputes are not cognizable under Section 10(k). Operating Engineers further argues that the notice of hearing should be quashed because Laborers' threat to picket and strike was a sham, resulting from collusion with the Employers to manufacture a jurisdictional dispute. Operating Engineers alternatively contends that, if the notice of hearing is not quashed, the disputed work should be awarded to employees it represents based on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, economy and efficiency of operations, and relative skills and training. Lastly, Operating Engineers contends that the scope of the award, if any is made, must be limited to the jobsites that were the subject of Operating Engineers' pay-in-lieu grievances.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*,

[8] They also point to evidence from *Donley's I* and *Donley's II* that, prior to the filing of the charges in this case, Operating Engineers threatened to strike over forklift and skid steer work at other worksites in the Cleveland area.

345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees, and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.

1. Competing claims for work

We find reasonable cause to believe that both Unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its letters from Local Business Manager Terry Joyce to each of the Employers, objecting to any assignment of the forklift or skid steer work to Operating Engineers-represented employees. In addition, "their performance of the work indicates that they claim the work in dispute." *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973); see also *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (same), citing *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003) (same).

We also find, despite its claims to the contrary, that Operating Engineers has claimed the disputed work. Operating Engineers filed pay-in-lieu grievances against each of the Employers, alleging contract violations with respect to their assignment of forklift and/or skid steer work to employees represented by Laborers. "The Board has long held that pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work." *Operating Engineers Local 18 (Donley's, Inc.) (Donley's II)*, 360 NLRB No. 113, slip op. at 4 (2014), citing *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010); *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 202 (2005).

Moreover, we find no merit in Operating Engineers' contention that it has made a work preservation claim. The record shows that Laborers-represented employees were performing the forklift and skid steer work at all of the Employers' construction projects, and that the Employers have consistently assigned work of the kind in dispute to employees represented by Laborers. Where, as here, a labor organization is claiming work that has not previously been performed by employees it represents, the "objective is not work preservation, but work acquisition," and the Board will resolve the dispute through a 10(k) proceeding. *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011), and cases cited.

2. Use of proscribed means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As set forth above, Laborers' Local business manager, Terry Joyce, sent a letter to each Employer stating that members of Laborers would picket and strike any projects where forklift and/or skid steer work was assigned to employees other than those represented by Laborers. These statements constitute threats to strike over the assignments of forklift and skid steer work, and such threats are a proscribed means of enforcing claims to disputed work. *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).

We find no merit in Operating Engineers' assertion that the Employers have colluded with Laborers to fashion a sham jurisdictional dispute. The Board has consistently rejected this argument "[i]n the absence of affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *Operating Engineers Local 150 (R&D Thiel)*, above, 345 NLRB at 1140; see also *Donley's II*, above, slip op. at 5. In this case, there is no evidence that Laborers' written threats to "picket and strike" over the assignment of the disputed work were the result of collusion with CEA and/or the Employers or were otherwise not genuine.

3. No voluntary method for adjustment of dispute

We further find no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. The Employers and Laborers stipulated accordingly, and Operating Engineers provided no evidence or argument to the contrary.

Based on the foregoing, we find that there are competing claims for the work in dispute, there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination, and we deny Operating Engineers' motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board has held that its determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The work in dispute is not covered by any Board orders or certifications.

As noted above, the Employers are signatories to a multiemployer collective-bargaining agreement with Operating Engineers. Paragraph 10 of the current collective-bargaining agreement between the CEA and Operating Engineers states:

> In accordance with the terms of this Agreement, the Employer shall employ Operating Engineers for the erection, operation, assembly and disassembly, and maintenance and repair of the following construction equipment regardless of motive power: . . . Forklifts, Skid steers . . . .

The Employers are also signatory to a separate multiemployer collective-bargaining agreement with Laborers. Article 1, section 7 of that agreement specifies numerous types of work within the jurisdiction of Laborers. Each provision states:

> The operation of forklifts, . . . [and] skid-steer loaders, . . . when used in the performance of the aforementioned jurisdiction shall be the work of the laborer [or laborers].

We find that the language in both contracts covers the work in dispute. Therefore, the factors of certifications and collective-bargaining agreements do not favor an award to either group of employees.

2. Employer preference and past practice

Representatives of the Employers testified that they prefer assigning the disputed skid steer and forklift work to employees represented by Laborers.

In addition, the Employers' representatives testified that assignment of this work to their Laborers-represented employees is consistent with their past practice. Specifically, Representatives for KMU, Schirmer, Platform, 21st Century, and Donley's testified that they always assign work of the kind in dispute to employees represented by Laborers.[9] Rob DiGeronimo, vice president of Independence, testified that Independence assigns forklifts and skid steers to Laborers except on "rare" occasions when they would assign the work to Operating Engineers, which occurred "less than five percent" of the time.

Operating Engineers cites to evidence of isolated instances when one of the Employers *may* have used an employee represented by Operating Engineers to operate a forklift or skid steer.[10] Such evidence, however, neither demonstrates the existence of a practice of using Operating Engineers-represented employees nor shows that the Employers' past practice of using Laborers-represented employees is inconclusive.[11] See, e.g., *Laborers Local 210 (Surianello General Concrete Contractor)*, 351 NLRB 210, 212 (2007); *Elevator Constructors Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1210 (2007); *Millwrights Local 1026 (Intercounty Construction Corp,)*, 266 NLRB 1049, 1052 (1983).

We find, therefore, that the factor of employer preference and past practice favors an award of the work in dispute to employees represented by Laborers.

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[9] Kevin Urig, owner of KMU, testified that since 2010, when KMU became a signatory to the Laborers-CEA agreement, KMU has assigned its forklift and skid steer work solely to Laborers. Urig further testified that, prior to signing the Laborers-CEA agreement, KMU did not use forklifts and it assigned skid steer work almost exclusively to non-union employees. John Roche, vice president of Schirmer, testified that, during his 30 years with Schirmer, Schirmer's forklifts and skid steers have been operated exclusively by employees represented by Laborers. Jason Klar, president of Platform, testified that Platform has assigned its forklift and skid steer work solely to employees represented by Laborers since Platform became a signatory to the Laborers-CEA agreement in 2002. Patrick Butler, president of 21st Century, testified that 21st Century has assigned its forklift and skid steer work to employees represented by Laborers since the company was founded in 2001. Mike Dilley, Donley's vice president of concrete operations, and Greg Przepiora, Donley's operations manager of Concrete, testified that during their 14 and 16 years, respectively, with Donley's, the forklift and skid steer work has always been assigned to employees represented by Laborers.

[10] In addition to DiGeronimo's testimony, above, about the rare occurrences, Operating Engineers cites to the following evidence in the record: (a) a picture of someone who resembles an Operating Engineers-represented employee on a skid steer at a Platform ite at an unspecified time; (b) the testimony of KMU owner Kevin Urg that KMU utilized Operating Engineers-represented employees "at one point in time"; (c) the testimony of 21st Century President Patrick Butler that he reassigned a skid steer from a Laborers-represented employee to an Operating Engineers-represented employee for about a week at a job site in Southwest Ohio after "the Operators BA … threatened my laborers on site"; and (d) the testimony of Operating Engineers member David Russell that he witnessed the intermittent operation of a skid steer and forklift by an Operating Engineers member at a Schirmer jobsite.

[11] Relying on *Longshoremen ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979), Operating Engineers also contends that the Employers' stated preference should be treated with skepticism because it is based on a sham. We find no merit in this argument. First, as noted above, the stated preference is consistent with the Employers' past practice. Second, *Longshoremen ILWU Local 50* is distinguishable because the employer's preference in that case changed after the charged union initiated a work action. Id. No such change has occurred here.

3. Area and industry practice

The Employers and Laborers argue that area and industry practice supports an award of the disputed work to Laborers-represented employees. In *Donley's II*,[12] Tim Linville, executive vice president of the CEA, testified that forklifts and skid steers are usually assigned to Laborers-represented employees and are sometimes assigned to carpenters or iron workers. And in both this proceeding and *Donley's II*, Joyce testified that, in his experience, the area practice in the building industry of Northeast Ohio is to assign forklifts to Laborers-represented employees, and not to Operating Engineers-represented employees.

In arguing that this factor weighs in favor of the employees it represents, Operating Engineers' introduced work orders from signatory contractors for the referral of Operating Engineers' members capable of operating skid steers and forklifts. Without more, however, this evidence does not establish that any Operating Engineers-represented employees actually performed skid steer and forklift work on the jobs to which they were referred. See *Donley's II*, above, slip op. at 6–7.[13]

We find based on the foregoing evidence that this factor favors an award of the work in dispute to employees represented by Laborers.

4. Relative skills and training

Both Laborers and Operating Engineers introduced evidence that they provide training in the operation of forklifts and skid steers and that the employees they represent are certified to operate this equipment. In addition, several representatives of the Employers testified that they provide training in the operation of forklifts and skid steers to their Laborers-represented employees, and that they are satisfied with the skills of those employees.

We find from this evidence that this factor does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Representatives of each of the Employers testified that it is more efficient and economical for them to assign the operation of forklifts and skid steers to employees represented by Laborers. They testified that their utilization of forklifts and skid steers is sporadic and is usually intermittent throughout the day. They stated that Laborers-represented employees perform multiple tasks in addition to the disputed work and, therefore, can leave the forklift or skid steer when it is not in use to perform these other tasks, which are duties that Operating Engineers-represented employees do not perform. They further explained that it would not be economical to hire employees represented by Operating Engineers to occasionally perform the work in dispute while also retaining employees represented by Laborers to perform the other work within Laborers' jurisdiction. They additionally testified that, because forklifts and skid steers are only used approximately 25 to 50 percent of the time, Operating Engineers-represented employees would be idle for substantial periods of time, when the equipment was not in use. See, e.g., *Seafarers International Union (Luedtke Engineering Co.)*, 355 NLRB 302, 305 (2010); *Laborers (Eshbach Bros., LP)*, above, 344 NLRB at 204.[14]

We find that this factor favors an award of the disputed work to the Laborers-represented employees.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. In making this determination,

[12] As mentioned above in fn. 4, the hearing officer granted the motion of Laborers and the Employers to incorporate the records in *Donley's I* and *Donley's II*, into the instant proceeding.

[13] Operating Engineers additionally cites to a 1954 interunion agreement between the International Union of Operating Engineers and the International Hod Carriers, Building and Common Laborers Union of America that appears to have been admitted into the record in *Donley's I.* However, neither the terms of that agreement, nor anything else in the record, indicates that the 1954 agreement covers the disputed work at these jobsites. Additionally, the record does not show that the Employers have agreed to be bound by the agreement, or that the area and industry practice in fact conforms to the terms of the agreement. See, e.g., *Plumbers Local 562 (Charles E. Jarrell Contracting Co.)*, 329 NLRB 529, 533 (1999) (finding that interunion agreement does not favor award of disputed work to either group of employees where record did not contain conclusive evidence as to whether the agreement covered the work in dispute, whether the employer had agreed to be bound by the agreement, or that area and industry practice conformed to the terms of the agreement).

[14] Operating Engineers contends that assigning the work in dispute to Laborers-represented employees would subject the Employers both to the labor costs of paying those employees and to the damages resulting from their breach of the pay-in-lieu provisions. This contention is without merit, as maintenance of pay-in-lieu grievances after the Board has awarded the work in dispute violates Sec. 8(b)(4)(ii)(D). *Iron Workers Local 433 (Otis Elevator Co.)*, 309 NLRB 273, 274 (1992), enfd. 46 F.3d 1143 (9th Cir. 1995).

Operating Engineers additionally contends that it would be equally efficient to assign the disputed work to Operating Engineers-represented employees if the Employers would also assign them other tasks, specifically, those that Laborers-represented employees currently perform. This contention, too, is without merit, as representatives of the Employers testified that the other tasks that Laborers-represented employees perform are within the jurisdiction of the Laborers in the CEA-Laborers contract and not the type of work typically performed by Operating Engineers-represented employees.

we award the work to employees represented by Laborers, not to that labor organization or its members.

Scope of Award

The Employers and Laborers request a broad area wide award, covering the geographic jurisdiction of Operating Engineers. In support, they argue that the evidence in prior Board cases (*Donley's I* and *Donley's II*) shows that Operating Engineers has a proclivity to violate Section 8(b)(4)(D) and that the dispute here is likely to recur.

In *Donley's II*, which issued after the conclusion of this proceeding, the Board granted a broad area wide award to employees represented by Laborers, for work of the kind in dispute. See *Donley's II*, supra, slip op. at 7–8. That award covers the area where Local 310's and Local 18's jurisdictions overlap, which encompasses the instant disputes in Cuyahoga County, Ohio. Our award in the instant cases restates and applies that area wide order.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of KMU Trucking & Excavating, Schirmer Construction Co., Platform Cement, Inc., 21st Century Concrete Construction, Inc., Independence Excavating, Inc., and Donley's Inc., who are represented by Laborers' International Union of North America, Local 310, are entitled to perform forklift and skid steer work in the area where their employers operate and the jurisdiction of Laborers International Union of North America, Local 310 and the International Union of Operating Engineers, Local 18 overlap.

Dated, Washington, D.C. September 3, 2014

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Harry I Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD